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OPINION

■ OPEN LETTER TO JUSTICE SCALIA

Executing the innocent

By Keith S. Hampton SPECIAL TO THE NATIONAL LAW JOURNAL

Dear justice Scalia:

I think I am sorry that I read your concurring opinion this summer in *Kansas v. Marsh*, 548 U.S. (2006), in which you label all who are concerned that innocent people have been executed as "sanctimonious" and ignorant, and suggest that everyone with such a concern is merely part of an "abolition lobby." That's a pretty breezy generalization, and it is as wrong as your proposition that there has never been "a single case—not one—in which it is clear that a person was executed for a crime he did not commit." You are either blind, or you aren't looking very hard.

Texas alone has at least three such cases: Carlos DeLuna, Ruben Cantu and Cameron Willingham. DeLuna and Cantu were both executed on crime-scene identification that the witnesses now repudiate. Let me quote your own court: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *U.S. v. Wade*, 388 U.S. 218 (1967). When we base death sentences on such evidence, why would you find it so hard to believe that we've killed one or two innocent people?

Maybe you think it just happens in misidentification cases. Then take the execution of Willingham for torching his home with his three daughters inside. He was convicted because the fire investigators in his case assumed arson when every bit of evidence was consistent with an accident. Innocent people can be just as easily executed on junk science and incompetent investigators as eyewitness misidentification. So you can see why I also can't agree with your cheery conclusion that every exoneration "demonstrates not the failure of the system but its success."

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You also claim that it was "the system" that uncovered cases of innocent people, and not some "outside force." Having been part of "the system" for many years, I can assure you that prosecutors and police do not investigate whether they "got it right" after they've sent someone to prison or to the death chamber. None of these cases would ever have come to light had not newspapers looked into them. Those who are part of "the system" (notably, police and prosecutors) react with denial and hostility when confronted with proof that they got it wrong. When the district attorney in the Cantu case learned that he was innocent, she promptly announced that she would prosecute the surviving victim, Juan Moreno, of "murder by perjury" because he succumbed to police pressure to misidentify Cantu at trial. This is the same guy who was shot nine times and clubbed half to death.

And the police who exploited an opportunity to exact revenge against Cantu? The *Houston Chronicle* and *San Antonio Express News* obtained recorded conversations between the DA investigators and the cops revealing that the cops were cleared well before the DA's "investigation" ever commenced. No, this really isn't "the system" self-correcting itself.

An 'insignificant minimum'?

But I think you know this because you radically shift positions at the end of your concurrence. Up to the end, you argue that you've scoured the country looking for proof that a single innocent person has been executed, and, finding none to your satisfaction, deduce "the system" is therefore actually infallible. Then you spring a brand new argument, not quite consistent with the former. Rather than "we've never killed an innocent person," your new argument is "sure we have, but it's a pretty small number." You wrote: "One cannot have a system of criminal punishment without accept-

ing the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum."

So I take it that if you became convinced an innocent person had been executed, you still wouldn't share the concerns that "the system" is in need of repair. This posture sort of undercuts the sincerity of your search for the white whale of innocence. You use the phrase "insignificant minimum" to describe the number of innocent people you imagine we've executed. How many is that? Ten? Fifty? The system: not infallible, but still the best? I bet you the family and friends of Willingham, Cantu and DeLuna never viewed them as "insignificant."

The casualness with which you sweep people into the oblivion of insignificance must be somehow made easier when the execution involves someone else's child or brother or friend. It is far worse to convict an innocent person than to let a guilty person go free. You've reversed and perverted this long-standing principle and seem to believe it is far better to kill innocent people so long as we also get a greater number of guilty ones. I think we have different sets of values. To sum up: You're dead wrong that only stupid people would oppose executing the innocent, and you're morally wrong not to care. It is wrong for the government to kill innocent people, period. I can't believe a Supreme Court justice thinks that is debatable. **NLJ**

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